

Editor's note: 78 I.D. 49; Appealed -- aff'd, sub nom. Kerr-McGee Chemical Corp. v. Morton,
Civ. No. 71-1852-F (C.D.Cal. Oct. 27, 1971)

WILLIAM R. WHITE ET AL.

IBLA 70-127

Decided February 19, 1971

Rules of Practice: Protests -- Sodium Leases and Permits: Leases

A protest against a waiver of the late filing of a sodium preference right lease application is properly dismissed where the protestant has not persuasively demonstrated that the waiver under the provisions of 43 CFR 1821.2-2(g) would be in violation of any express exception therein.

1 IBLA 273

IBLA 70-127 :

R 31, 34 and 35

WILLIAM R. WHITE	:	Protest against sodium
MAURITZ J. KALLERUD	:	preference right lease
HOWARD J. WINTERBOTTOM	:	applications dismissed
OCCIDENTAL PETROLEUM CORPORATION	:	
KERR-McGEE CHEMICAL CORPORATION	:	Affirmed
Protestant		

DECISION

Kerr-McGee Chemical Corporation (Kerr-McGee), formerly American Potash & Chemical Corporation, 1/ has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated February 24, 1970. The decision appealed from dismissed Kerr-McGee's protest of the Bureau's decision of October 16, 1969, which remanded to the Riverside district and land office sodium preference right lease applications R 31, 34 and 35 of William R. White, Mauritz J. Kallerud and Howard J. Winterbottom, respectively. It authorized issuance of the applied for leases and approval of the pending assignments of the prospecting permits to Occidental Petroleum Corporation (Occidental) in the absence of objections other than the late filing of the applications for the preference right leases. The protest was dismissed because of failure to establish any error in the protested decision.

Sodium prospecting permits R 31, 34 and 35 were issued effective November 1, 1966, for a two-year period to White, Kallerud and Winterbottom. On July 25, 1968, assignments of record title to each permit were filed by Occidental, together with requests for their approval and approval of excess acreage. The land office took no action on the latter requests. On October 16, 1968, Kerr-McGee

1/ American Potash & Chemical Corporation, subsequent to filing its appeal, changed its corporate name to Kerr-McGee Chemical Corporation.

filed a protest against approval of the assignments to Occidental, essentially contending Occidental failed to comply with the Federal regulations governing sodium. By decision of February 18, 1969, the land office dismissed the protest because Kerr-McGee failed to serve a copy of the protest on Occidental or the other persons named as being involved in the protested leases or permits. Kerr-McGee did not appeal from that decision.

A sodium permittee who discovers valuable deposits before his permit expires is entitled to a preference right lease. 30 U.S.C. 262 (1964). The regulations allow a prospecting permittee 30 days after expiration of his permit within which to file an application for a preference right lease. This was formerly provided in 43 CFR 3152.5, and is now substantially repeated in 43 CFR 3520.1-1 and 3521.1-1 (35 F.R. 9502, 9513, 9514). The two-year term of the subject prospecting permits expired on October 31, 1968. Preference right lease applications were filed on December 13, 1968, by White and Kallerud, and on December 18, 1968, by Winterbottom. The lease applications were for less than the total acreage in the respective permits. The land not included in the lease applications was indicated as being included in an application for a right-of-way for a solar pond, referenced by serial number.

Kerr-McGee on January 20, 1969, and other later dates, filed sodium prospecting permit applications and other applications for lands within the area included in the subject preference right lease applications.

The land office on February 20, 1969, held that the subject prospecting permits had expired, rejected the preference right lease applications as not having been timely filed, and declared the assignments to Occidental as moot because the permits expired. Appeals were taken by each permittee and Occidental.

While the appeals were pending, upon request, the Director, Geological Survey, in a memorandum dated October 3, 1969, reported that timely valuable discoveries of sodium deposits were made on the lands involved in the subject permits and recommended the issuance of preference right leases to the applicants.

The Office of Appeals and Hearings, Bureau of Land Management, in a decision rendered October 16, 1969, remanded the cases to the Riverside district and land office, holding the lateness of the filings for preference right leases should be waived and the applications accepted within the purview of 43 CFR 1821.2-2(g). That regulation, in pertinent part, provides:

When the regulations of this chapter (except Parts 1840 and 1850) provide that a document must be filed . . . within a specified period of time, the filing of the document . . . after the expiration of that period will not prevent the authorized officer from considering the document as being timely filed . . . except where:

1. The law does not permit him to do so.
2. The rights of a third party or parties have intervened.
3. The authorized officer determines that further consideration of the document . . . would unduly interfere with the orderly conduct of business.

It is against this decision of the Bureau that Kerr-McGee filed its protest. A subsequent decision of February 24, 1970, by the Office of Appeals and Hearings, Bureau of Land Management, acting for the Director, dismissed the protest of Kerr-McGee, and is the basis for the present appeal to the Secretary.

The decision below, after discussing fully each of the arguments asserted by the protestants, found the review of the land office action on appeal was a proper function under the supervisory authority of the Director, and was not contrary to any regulation or precedent. Kerr-McGee's application for sodium prospecting permits on the lands included in the preference right lease applications did not create any third party rights within the context of 43 CFR 1821.2-2(g). It could not be assumed that the adverse decision by the land office was based on a determination that acceptance of the late filings would unduly interfere with the orderly conduct of business in the office, and it was not improper to remand the cases for acceptance of the late filings under the circumstances presented. The records before that office contained no later assignments, but they did contain information that Searles Lake Chemical Corporation (SLCC) is a wholly-owned subsidiary of Occidental, which is recognized as the primary party in interest. When the Bureau's decision of October 16, 1969, was issued, each case file did contain a notice that a discovery of sodium had been made within the permitted area during the life of the permit. Therefore, since each permittee had earned a statutory right to a sodium lease, late filings for such leases under 43 CFR 1821.2-2(g) should have been accepted. The land office, after action on the preference right lease

applications has been concluded, should adjudicate all pending applications for sodium prospecting permits affecting lands contained in the preference right leases. Finally, the action directed by the Bureau decision of October 16, 1969, is consistent with past Bureau practice in similar circumstances.

The arguments presented on appeal to the Secretary are essentially the same as those set forth in the protest considered below. We have carefully considered the decision of the Office of Appeals and Hearings, Bureau of Land Management, acting for the Director, which discusses in detail the points raised by the protestant and find that the discussions and findings are correct. Any further discussion of them would serve no useful purpose.

Protestant's argument, relying on Superior Oil Company v. Udall, 409 F.2d 1115 (D.C. Cir. 1969), that the land office manager was the "authorized officer" and his decision to reject the subject lease applications was final and not subject to review by the Director, Bureau of Land Management, was properly rejected by the decision below. It is noted that pursuant to an agreement of the parties, 76 I.D. 69 (1969), a joint motion was filed to withdraw the opinion and vacate the judgment in Superior, supra. On consideration of the joint motion the Court of Appeals ordered the cases remanded to the District Court to dismiss the cases as moot. Superior Oil Company v. Hickel, 421 F.2d 1089 (D.C. Cir. 1969).

In conclusion, it has not been persuasively demonstrated by the protestant that a waiver of the untimely filing of the subject sodium preference right lease applications under the provisions of 43 CFR 1821.2-2(g) would be in violation of any express exception therein. Accordingly, the protest was properly dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed and the case is remanded to the Bureau of Land Management for appropriate action on the sodium preference right lease applications consistent with this decision.

Francis E. Mayhue, Member

We concur:

Martin Ritvo, Member

Edward W. Stuebing, Member

